

(2010) 05 BOM CK 0041

In the Bombay High Court

Case No : Writ Petition No. 4104 of 2009

Bhagwandas Purohit

APPELLANT

Vs

Machindra Patil and Chandrashekhar Shankar Nandedkar

RESPONDENT

Date of Decision : 03-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 66, Order 21 Rule 72, Order 21 Rule 84, Order 21 Rule 84(1)

Citation : (2010) 3 BC 272 : (2010) 4 BomCR 68 : (2010) 4 CivCC 786

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : Ajay Talhar, for the Appellant; S.B. Yawalkar and Vinod P. Patil, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Borde, J.—Heard Shri Ajay Talhar, learned Counsel for petitioner, Shri S.B. Yawalkar, learned Counsel for Respondent No. 1 and Shri Vinod P. Patil, learned Counsel for Respondent No. 2.

Rule, made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

2. Petitioner - original defendant is raising exception to the order dated 02.05.2009, passed by II Joint Civil Judge, Senior Division, Jalgaon, below Exhibit 75 in Special Darkhast No. 38/2006, whereby objection application tendered by petitioner - judgment debtor came to be turned down by the executing court.

3. Respondent No. 1 is decree holder who had presented Special Civil Suit No. 252 of 2001 claiming recovery of amount of Rs. 5,29,000/against petitioner - judgment debtor. Suit presented by Respondent No. 1 came to be decreed on 23rd December 2005 by 4th Ad hoc Additional District Judge, Jalgaon. The judgment and decree passed by the trial Court was subject matter of challenge in

First Appeal No. 704 of 2006 at the instance of petitioner - judgment debtor. Appeal is admitted by this Court on 18.01.2007. Initially stay of execution of decree was granted on condition of deposit of Rs. 4,00,000/- by appellant - judgment debtor. However, petitioner - judgment debtor failed to deposit the amount. As such, interim stay to the execution of decree granted by this Court in First Appeal stood vacated.

4. Special Darkhast No. 38 of 2006 came to be presented by Respondent No. 1 - original decree holder seeking execution of decree. The property in question bearing G. No. 800 admeasuring 71 acres was put to auction. The auction sale was conducted on 2nd March 2009 after observing procedure prescribed in that behalf. Initially, it appears, one Sitaram Omkar Puprohit, who participated in the bid, was declared as successful bidder, whose offer for purchase of land was for Rs. 4,61,000/-. His bid was accepted on 02.03.2009 and he was directed to deposit 25% of the amount. However, said Sitaram failed to make deposit of the amount up to 5.30 p.m. on the said date, as such, his offer was cancelled. On the same day, property was put to resale and Respondent No. 2, whose bid was second highest, agreed to purchase the property for an amount of Rs. 4,61,000/- equivalent to the offer made by Sitaram Purohit. The offer made by Respondent No. 2 was, therefore, accepted. However, by the time proceedings for resale were completed, Court time was over. As such, he was permitted by the executing court to deposit 25% of the amount on the next day i.e. 03.03.2009. Accordingly, Respondent No. 2 deposited 25% of the amount on 03.03.2009 and has also deposited balance of 75% amount within period permissible in law.

5. In the meantime, judgment debtor presented an application purported to be an application under Rule 101 of the CPC and objected to auction proceedings. In the application tendered by judgment debtor, it is contended that Respondent No. 2, whose bid was accepted, was required to deposit 25% of the amount on 2nd March itself, however, he was permitted to deposit the amount on next day i.e. 3rd March, which is not permissible in accordance with Rule 84 of Order XXI of the Code of Civil Procedure. On this count alone, according to judgment debtor, auction proceedings are liable to be quashed. Another objection raised by the judgment debtor is that valuation of the property is Rs. 23,82,938/-, whereas, same is being sold at meager amount of Rs. 4,61,000/-. Next ground of challenge is that the property in question is already mortgaged to Central Bank for an amount of Rs. 5,00,000/- borrowed by the judgment debtor and as such, the property is not liable to be put to auction sale. In this view of the matter, it was urged to the executing Court to set aside the auction sale.

6. The application tendered by judgment debtor was opposed by decree holder contending that first highest bidder, namely Sitaram Purohit failed to deposit 25% of the amount on the same day, as such, in accordance with Rule 84 of the Code of Civil Procedure, the property was put to resale and Respondent No. 2, who was second highest bidder, raised his bid to match with offer made by Sitaram Purohit and agreed to purchase the property. By the time, proceedings

were finalised, the Court time was over. As such, upon request made by Respondent No. 2, he was permitted to make deposit of the amount on the next day. It is contended that there is no infirmity in the procedure and as such, application tendered by judgment debtor is liable to be rejected.

7. The executing court, on consideration of contentions raised by respective parties, was pleased to reject the application in view of order passed on 02.05.2009. The order passed by executing Court, referred to above, is subject matter of challenge in this petition.

8. Learned Counsel appearing for petitioner has vehemently contended that executing court has erred in permitting resale of the property in favour of Respondent No. 2 and has also committed an illegality in accepting 25% of the amount on next day. According to learned Counsel appearing for petitioner, the purchaser has to deposit 25% amount immediately. On failure to deposit the amount, the sale is liable to be declared as invalid meaning thereby there is no sale in the eye of law at all. According to learned Counsel appearing for petitioner, for holding resale, a notification calling fresh bids is again required to be published and only after following the procedure of inviting afresh bids, the property could be resold. It is also contended that valuation of the property is far more than the price offered by successful bidder and as such, bid finalised needs to be set aside.

9. Learned Counsel appearing for Respondent No. 1 decree holder as well as Respondent No. 2 - purchaser at auction sale, have opposed contentions raised by petitioner and supported the order passed by executing court. It is the contention of Respondents that on failure of the purchaser to deposit 25% of the amount, the property is required to be resold forthwith and the procedure does not contemplate publication of fresh proclamation. The property is required to be resold then and there. It is contended that as permitted by the executing Court, Respondent No. 2 deposited the amount to the extent of 25% on the next day. The reason behind depositing the amount on the next day is that the Court time was already over and Nazir of the Court was unable to accept the amount. It is also contended that balance of 75% amount has also been deposited by Respondent No. 2 and in such circumstances, it is proper for the executing Court to issue sale certificate in his favour and direct that he be put in possession of the property.

10. I have heard arguments of learned Counsel for respective parties and perused the record. It would be appropriate to refer to Rule 84 of Order XXI of the Code of Civil Procedure:

84 Deposit by purchaser and resale on default - (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty five per cent, on the amount of his purchase money to the offer or other person conducting the sale, and in default of such deposit, the property shall forthwith be resold.

(2) Where the decree holder is the purchaser and is entitled to setoff the purchase money under Rule 72, the Court may dispense with the requirements of this rule.

11. So far as instant case is concerned, it is not controverted that Sitaram Purohit was the successful bidder whose offer for purchase of property for Rs. 4,61,000/- was highest. It is also borne out from record that he failed to deposit the amount up to 5.30 p.m. on the given date i.e. 02.03.2009. The property was thereafter resold in favour of second highest bidder who agreed to raise his bid to Rs. 4,61,000/-. The executing Court accepted offer of Respondent No. 2 and as time for deposit of 25% of the amount was over, the Court permitted him to deposit the amount on next day.

12. Rule 84 contemplates deposit of 25% amount immediately after declaration. The deposit of amount by Respondent No. 2, in the circumstances noted above, on the next day i.e. on 03.03.2009 cannot be construed as delayed payment. The main objection raised by judgment debtor that the property needs to be put to reauction meaning thereby afresh proclamation needs to be issued, is not acceptable for the reason that Rule 84 contemplates that in default of payment of purchase money by the successful bidder, the property shall be resold forthwith. Resale of the property immediately i.e. "forthwith" does not contemplate observance of the procedure, as contemplated by Rule 66 and onwards.

13. Relying upon the Full Bench judgment in the case of Chintala Venkatasubbiah (died) and Another Vs. Kattapalli Akamma, , the Karnataka High Court, in the matter of Kamaxi Kom Bhikku Shetty Vs. Vaman Thippayya Bhattageri, , has observed thus:

As fresh sale proclamation is not called for, the resale on the same day immediately following on the abortive sale should be encouraged if circumstances justify.

14. The term "forthwith" occurring in Rule 84 of Order XXI of the CPC has been explained by Nagpur High Court in the matter of AIR 1948 142 (Nagpur) , wherein it is observed thus:

In all cases where the word "forthwith" occurs, it must ordinarily be understood to mean "within a reasonable time". (See Maxwell's Interpretation of Statutes Edn. 8, p. 351, where the following passage occurs:

When a statute requires that something shall be done "forthwith", or "immediately", or even "instantly", it would probably be understood as allowing a reasonable time for doing it.

15. Reliance can also be placed on the observations made by the Apex Court in the matter of Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, :

The provisions of Order 21 Rules 84, 85 and 86 requiring the deposit of 25 per cent of the purchase money immediately, on the person being declared as a purchaser, such person not being a decree holder, and the payment of the balance within 15 days of the sale, are mandatory and upon noncompliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a stranger purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Nonpayment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the court is bound to resell the property (Rule 86) in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. 16 Cal 33, Overruled; Remark in AIR 1931 Lah 15, Not approved.

16. It is well established that Rule 84 does not lay down requirement of issuing fresh proclamation before conducting resale. What is contemplated by Rule 84 of Order XXI is that on failure of purchaser to deposit 25% of the amount immediately i.e. in the event of sale rendering abortive, the property shall be forthwith resold and in the instant matter also, having found that Sitaram Purohit, who had offered highest price, failed to deposit 25% of the amount, the property was resold to Respondent No. 2.

17. Learned Counsel appearing for the petitioner has placed heavy reliance on the judgment of this Court in the matter of Jagdish Radhakisan Kayasth Vs. Ramesh N. Wagh and Others, . In the reported matter, the prospective purchaser, whose bid was for an amount of Rs. 91,000/-, had failed to deposit the amount on the date of conduct of auction and his request for extension of time was also rejected by the executing Court on the same day. He, however, deposited the amount on next day with the executing court. On the next day, there were two offers made by third parties, one for an amount of Rs. 3,50,000/- and another for an amount of Rs. 2,50,000/-. The executing Court allowed the third party, namely Ramesh Choube to deposit Rs. 3,50,000/- on or before 04.01.1999 by way of security to establish his bona fides. The executing Court passed an order to the effect that considering price of the property as contended by judgment debtor to be Rs. 7,00,000/-, in order to safeguard his interest, prayer of judgment debtor was accepted and property was kept for resale on 04.12.1999 at the cost of judgment debtor. It is further made clear in the order that if no sale takes place on the given date, the offer of third party would be confirmed. On failure of third party to deposit amount, the offer of first auction purchaser will be considered. It further transpires that Ramesh Choube, who offered to deposit amount of Rs. 3,50,000/-, had failed to deposit the amount and as such, auction in favour of first purchaser had been confirmed for an amount of Rs. 91,000/-. In these circumstances, judgment debtor approached the Court contending that on failure of first auction purchaser to deposit the amount on given date, as contemplated by Rule 84 of Order XXI of the Code of

Civil Procedure, the auction proceedings were rendered null and void and in the eye of law there is no sale of the property. It was not open for the executing Court to accept the offer of first auction purchaser on deposit of amount on next day when on earlier day, the executing Court refused to extend time. In the reported matter, with a view to examine bona fides of the judgment debtor, the Court permitted him to bring a prospective purchaser who would be willing to deposit highest price. Accordingly, one Rahul Pethe offered to purchase the property for Rs. 3,50,000/- and in fact deposited sum of Rs. 1,50,000/- in the Court. He also undertook to deposit further balance sum of Rs. 2,00,000/- in the event of acceptance of his bid. In these circumstances, this Court thought it fit to examine the case put up by judgment debtor. One thing, that is required to be taken into account, is that there is a vast difference between offer made by first auction purchaser and offer made before this Court in pending petition. The difference is more than 3 / 4 times. In the instant matter, petitioner could bring a prospective purchaser who was willing to offer additional sum of approximately Rs. 39,000/-. Considering the facts of instant case, ratio laid down in the reported judgment cannot be made applicable. This Court, while causing interference in the reported matter, has taken into account provisions of Rule 84 of Order XXI of the Code of Civil Procedure. In the reported matter, the prospective purchaser failed to deposit 25% of the amount on the day of conduct of sale and his prayer for extension of time was turned down. It was, therefore, obligatory for the executing Court to resale the property as mandated by Rule 84. However, instead of adopting permissible course, the executing court permitted first auction purchaser to deposit the amount on the next day and same is not permissible in terms of Rule 84. In paragraph 24 of the judgment, this Court has observed thus:

If the auction purchaser fails to deposit 25% of the purchase money as required, the officer conducting sale has no authority to extend time for such deposit and in default of such deposit the officer or the person conducting the sale has to put the property to resale and has to continue with the auction sale. There is a reason behind such deposit. Failure to deposit 25% of the purchase money results in automatic cancellation of sale of the property and the same is required to be put to resale forthwith so as to avoid further loss of time and expenses involved for reproclamation and republication of such auction sale. The purpose is not only to save money and time but to realise the sale proceeds of the property as expeditiously as possible so as to realise the fruits of the decree.

18. Learned Single Judge, while dealing with the matter, has further observed in paragraph 26 of the judgment that:

Having found that the auction sale dated 12.12.1999 was null and void, acceptance of the entire amount of Rs. 91,000/- on the next day by the Executing Court, by no stretch of imagination, can be said to be legal and valid, as Respondent No. 2 auction purchaser was never declared to be the successful purchaser as contemplated under Rule 84(1).

In the subsequent paragraph, this Court has also taken into account failure of third party i.e. Ramesh Choube to deposit amount of Rs. 3,50,000/-. The executing Court, in the reported judgment, on account of failure of third party to deposit amount offered i.e. Rs. 3,50,000/-, proceeded to confirm the sale in favour of first auction purchaser for Rs. 91,000/-. This was found by the learned Single Judge to be irregularity and therefore, this Court proceeded to quash the auction also on account of failure of the executing court to extend an opportunity of hearing to the judgment debtor.

19. In the given set of facts of instant matter, the executing Court has acted in consonance with Rule 84 of Order XXI of the Code of Civil Procedure. On failure of the first bidder to deposit amount, the property was immediately resold to Respondent No. 2 and the executing court, on request made by Respondent No. 2 because of closure of transactions of the Court on the given date, permitted him to deposit amount on the next day. In the given set of facts, considering mandate of the Apex Court in Manilal's case (cited supra), I am of the view that procedure adopted by executing court is legal and proper and do not call for any interference. Instant petition is devoid of substance.

20. In the result, Petition stands dismissed. Interim relief stands vacated. Rule discharged. In the facts and circumstances of the case, there shall be no order as to costs.